No. 12150

IN THE

United States Court of Appeals

For the Ninth Circuit

California Association of Employers, a California Corporation doing business under the firm and style of Reno Employers Council,

Appellant.

vs.

Building and Construction Trades Council of Reno, Nevada, and Vicinity, *et al.*, and National Labor Relations Board,

Appellees.

On Appeal from the United States District Court for the District of Nevada

REPLY BRIEF TO THE BRIEF OF THE NATIONAL LABOR RELATIONS BOARD and BRIEF OF OTHER APPELLEES

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I.

REPLY TO BOARD'S REPLY

As stated in the Board's Brief, page 8, the point here involved is correctly stated, "In short, the Association stated that it was not asking the court to determine whether certain past or threatened conduct by the Union constituted unfair labor practices under the Act, or to remedy such

practices; it was merely asking the court to render a declaratory judgment as to whether any collective bargaining contract between the Association and the Union was governed by the Act. (R. 173-175)."

Appellants contend that there was a justiciable controversy in the instant case, to-wit: a disagreement as to whether the industry involved was engaged in interstate commerce or affected the same in such a manner as to place the negotiations between the parties whose interests were adverse (R. p. 7). Under Federal Act there was a tangible legal interest in the controversy by the party asserting it—for if the appellant entered into a contract providing for a closed shop or other union security provision and it were later determined that the industry represented came under the provisions of the Labor Management Act of 1947, each of the firms represented by Appellant might, under the terms of that Act, be subjected to penalties under the provisions thereof. The issue presented was and is ripe for adjudication. The parties were stalemated and the existing contract would, by its terms, expire at midnight, May 21, 1948.

The complaint filed by the Association in the District Court alleged a cause of action for declaratory judgment. If the complaint had ended by so doing—this question would have been apparent, the real issue is, if the complaint states a cause of action for declaratory relief, which Appellants state that it does, has the District Court jurisdiction to grant such relief?

The complaint as originally filed, by necessity, contained

many allegations in addition to stating a cause of action for declaratory relief, in order to disclose grounds sufficient for the Court to issue the temporary restraining order. The Court issued such order under the authority contained in United States v. United Mine Workers, 330 U. S. 258, 91 L. Ed. 884, 67 S. Ct. 677. No point is made on this appeal of the District Court's right to issue such order.

The Board's Brief, page 10, assumed that because the complaint stated the reasons for the reaching of an impasse in negotiations, being that the Association took the position that any contract to be entered into would be compelled to comply with the provision of the Labor Management Act of 1947, and the Union in taking the position that any such contract would not be so governed, and the position of the Union being that a closed shop provision was required if they were to enter into such contract, the action was one to remedy an unfair labor practice before the Court rather than the National Labor Relations Board. While the complaint might incidentally state such an unfair labor practice, it does not deprive the District Court of jurisdiction to render declaratory relief by deciding coverage under the facts stated therein.

The Board's argument further assumes:

1. That because a declaratory judgment of District Court might possibly prevent an unfair labor practice in the future, therefore Section 10(a) of the Labor Management Relations Act of 1947 gives the Board the exclusive right to decide the "subsidiary question," is the Act applicable to these particular persons and controversies; and

2. That because the Unions and the Association in good faith held differences of opinion in whether their contracts were under the provision of that Act or not, constituted an unfair labor practice, as it was a failure to bargain in good faith, and therefore should be a matter exclusively within the jurisdiction of the Board.

It is conceded that the case of Amazon Cotton Mill Co. v. Textile Workers Union, 167 Fed. 2d 183, held under the facts of that case that the Board had exclusive right to invoke remedy of injunction to prevent an unfair labor practice, and that the Court did not. The facts of that case were different than the ones in the case at bar where we are merely seeking a declaratory judgment to the effect that Association is or is not within the commerce sections of the Labor Management Relations Act of 1947. Since the Amazon decision, the United States Supreme Court in Algoma Plywood and Veneer Company v. Wisconsin Employment Relations Board, decided 7 March, 1949, ... U. S. ....., 93 L. Ed. Advance Sheet 10541, had occasion to reject in principle the contention of the Board that it alone has exclusive jurisdiction to prevent unfair labor practices and that declaratory relief available to Association in this case has been withdrawn from the District Court. Appellants contend that the argument contained in Point I of the Board's Brief, pages 13 to 23, as to intent of Congress is totally rejected by the Supreme Court.

The facts in the above case were briefly these:

Under pressure from the Department of Labor and the War Labor Board, an employer agreed to a maintenance-of-

membership clause in its collective bargaining agreement with a union, which previously, after an election held by the National Labor Relations Board, was certified by the Board as bargaining representative for all production employees. The clause was carried over from year to year, even after the dissolution of the War Labor Board. Pursuant to that clause the employer discharged an employee who refused to pay union dues.

Under a State statute making it an unfair labor practice for an employer to enter into an all-union agreement with the representatives of his employees unless such agreement has been approved by a specified majority of the employees, the State Employment Relations Board ordered the employer to cease and desist from giving effect to the maintenance-of-membership clause, to offer the employee reinstatement, and to make him whole for any loss of pay. This order was sustained by the highest court of the State, *as against the objections of the employer and the union that the jurisdiction of the State Board was ousted by the exclusive authority of the National Labor Relations Board, and that the State statute was repugnant to the National Labor Relations Act.*

A majority of the Supreme Court of the United States, in an opinion by Frankfurter, J., held that the effect given the State statute by the judgment of the State Supreme Court did not conflict with the enacted policies of Congress. The opinion reviews the legislative history of the Taft-Hartley Act, and on page 545, L. Ed. has this to say:

> "In seeking to show that the Wisconsin board has no power to make the contested orders petitioner points

first to Sec. 10(a) of the National Labor Relations Act, which is set forth in the margin. It argues that the grant to the National Labor Relations Board of "exclusive" power to prevent "any unfair labor practice" thereby displaced State power to deal with such practices, provided of course that the practice was one affecting commerce. But this argument demands to equally untenable assumptions. One requires disregard of the parenthetical phase "(listed in Section 8)"; the other depends upon attaching to the section as it stands the clause "and no other agency shall have power to prevent unfair labor practices not listed in Section 8." . . .

". . . Here Wisconsin has attached conditions to their enforcement and has called the voluntary observance of such a contract when those conditions have not been met an "unfair labor practice." Had the sponsors of the National Labor Relations Act meant to deny effect to State policies inconsistent with the unrestricted enforcement of union-shop contracts, surely they would have made their purpose manifest. So far as appears from the Committee Reports, however, Sec. 10(a) was designed, as its language declares, merely to preclude conflict in the administration of remedies for the practices proscribed by Sec. 8. The House Report, after summarizing the provisions of the section, adds, "The Board is thus made the paramount agency for dealing with the unfair labor practices described in the bill." H. R. Rep. No. 969, 74th Cong. 1st Sess. 21. See also the identical language of H. R. Rep. No. 972, 74th Cong. 1st Sess. w1 and H. R. Rep. No. 1147, 74th Cong. 1st Sess. 23. And . . ."

". . . The contention that Sec. 10(a) of the Wagner Act swept aside State law respecting the union shop must therefore be rejected . . ."

The Court continued, page 548, as follows:

"Section 10(a) of the Taft-Hartley Act, 29 USCA, Sec. 160(a), 9 FCA, Title 29, Sec. 160(a), which is set

forth in margin, contains important changes, but none requiring modification of the conclusions we have reached as to the corresponding section of the National Labor Relations Act. One phrase, however, reinforces those conclusions; that is the phrase "inconsistent with the corresponding provision of this Act."

"These words must mean that cession of jurisdiction is to take place only where State and Federal laws have parallel provisions. Where the State and Federal laws do not overlap, no cession is necessary because the State's jurisdiction is unimpaired. This reading is confirmed by the purpose of the provision in which the phrase is contained: to meet situations made possible by Bethlehem Steel Corp. v. New York State Labor Relations Bd., 330 U. S. 767, 91 L. ed. 1234, 67 S. Ct. 1026, where no State agency would be free to take jurisdiction of case over which the National Board had declined jurisdiction."

It is true that the Supreme Court in the above case was discussing the relative jurisdictions of State and Federal jurisdictions in relation to the Taft-Hartley Act. Yet in principle we feel the case is important, because of the fact that the Board, here in its Brief, assumes that because it must of necessity determine coverage of the Act upon complaints of unfair labor practices being submitted to it, it thereby can relegate to itself the sole exclusive jurisdiction under the Declaratory Judgment Act of Congress, to determine coverage when the same is an issue before a Federal District Court in a proper controversy brought before the District Court, under 28 USCA, Sec. 400, now 28 USCA 2201 and Sec. 2202. A reading of Sec. 400 and Sec. 2201 and Sec. 2202 does not limit declaratory judgment in cases where there is a proper controversy concerning the application of the Taft-Hartley Act or any other Federal law. The

matter presented to the District Court simply involved a dispute as to whether or not under the facts alleged in the complaint, the activities of the Association and Union in the particular industry involves or "affects commerce" within the terms of Sec. 2(6) and (7) Labor Management Relations Act, 1947. That is as far as the Appellants desired the District Court to go in its declaration of rights under the complaint. The question is now asked: Where in the Taft-Hartley Act is any language used which indicates an intent of Congress to limit the Federal District Courts in affording declaratory relief, and making such relief available exclusively within the Board?

Since the action here did not involve an unfair labor practice insofar as the declaratory relief sought was concerned, we feel that the recent decision Algoma P. & V. Co. v. Wisconsin Emp. Rel. Bd., ... U. S. ....., 93 L. Ed. Adv. 10, 541, in principle answers Point I, A and B of Board's Brief, pages 13 to 23.

The statement found in Board's Brief, page 20,

> ". . . The sole change made by the amended Act empowers the District Courts to decide these questions preliminarily but only when requested to do so by the Board, as an aid to proceedings pending before the Board. The failure of Congress to expand the jurisdiction of the District Courts beyond this is further evidence of the purpose of Congress to reaffirm the exclusive nature of the power conferred upon the Board to determine controversies concerning the coverage and meaning of the Act."

Under the above case of the United States Supreme Court this contention will not be true. If it were true under the

authorities cited by Counsel for the Board, it still would be applicable only to certain controversies involving unfair labor practices and not question of coverage.

The Amazon case cited in the Board's Brief and the case of Gerry v. Superior Court, 194 Pac. 2d 689, have no application on this appeal where the District Court was called upon under the Declaratory Judgment Act to determine a controversy concerning coverage under the Act. It is conceded in the Board's Brief that we are now only asking for a Declaratory Judgment, page 8. No unfair labor practice is here sought to be determined or enjoined.

Counsel for Appellee have been unable to produce one authority holding to the effect that 28 USCA, Sec. 400, now 2201, has been in anywise restricted by any provision of the Taft-Hartley Act.

In reply to Point II of the Board's Brief, pages 23 and 24, that the complaint was properly dismissed because appellant failed to exhaust a complete and adequate administrative remedy, it is pointed out that this position totally ignores the provisions of the Declaratory Judgment Act, 28 USCA, Sec. 400, now Sec. 2201, and particularly Rule 57 of the Federal Rules of Civil Procedure, which provides as follows:

> ". . . The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate . . ."

We submit that Point II is fully answered by the case of Oil Workers International Union, Local No. 463, et al v. Texoma Natural Gas Co., 146 Fed. 2d 62, decided Dec.

1, 1944, rehearing denied 3 Jan. 1945, certiorari denied 65 S. Ct. 1017, 334, U. S. 872, 89 L. Ed. 1426, rehearing denied. This was action brought under the Federal Declaratory Judgment Act by Company against Union to determine controversies under a contract of plaintiff with defendant, a hearing was held before National War Labor Board which declined jurisdiction on merits, but directed parties to arbitrate as provided in their contract.

The Court in that case, (5th Circuit) Lee, J., at page 65, (3) said:

> "The National War Labor Board is not, under the law, vested with judicial functions, nor does it have the power to enforce its determinations, called "directives," upon the parties to a controversy before it. It is not a substitute for the courts, and the pendency of a controversy before it is not a bar to a suit in the courts. This limitation upon its powers is recognized by it, for in its statement of its public policy respecting awards, dated September 10, 1943, it said:
>
> "The Board's determination of the matter will constitute a final adjudication unless and until a tribunal of competent jurisdiction issues rulings contrary to those of the Board. The action of the Board in no way prejudices the right of a party to appeal to a Court of competent jurisdiction a judicial declaration of the rights and obligations flowing from the award. The Board's order will be made expressly subject to discontinuance should a Court render a decision contrary to the conclusions of the Board."
>
> "The Declaratory Judgment Act should be liberally construed, Mississippi Power & Light Co. v. City of Jackson, 5 Cir., 116 F. 2d 924, certiorari denied 312 U. S. 698, 61 S. Ct. 741, 85 L. Ed. 1133; and where a justifiable controversy exists between parties who are citizens of different states with regard to rights having

a value in excess of $3,000, as here, the United States District Courts are vested with jurisdiction. The court below found that the controversy between the parties related to their rights and liabilities under their contract; that the parties had taken adverse positions with respect to their respective rights and obligations; that, therefore, a justifiable controversy existed, appropriate for judicial determination under the Declaratory Judgment Act. We agree. An employer may establish the seniority rights of an employee in dispute with other employees, as well as general rights which their contract relationship establishes, without waiting to be sued for breach or for damages or for specific performance, and thus secure an "interpretation of the contract during its actual operation" and stabilize an "uncertain and disputed relation." (Citing Borchard, Declaratory Judgments, 2nd Ed. 546) Exhaustion of the Administrative Remedies Granted by the War Labor Disputes Act, 50 USCA, Appendix Sec. 1507 et seq., and Executive Order No. 9017, of January 12, 1942, 50 U. S. C. A. Appendix Sec. 1507 note, to employer and employee is not a prerequisite to the bringing of a court action by either party for an alleged violation by the other of a labor agreement.

"The judgment appealed from is correct. It is accordingly affirmed."

This is a reasonable decision because Rule 57 of the Federal Rules of Civil Procedure provides: ". . . The existence of another adequate remedy does not preclude a judgment for declaratory relief in a case where it is appropriate . . ." Even under the new Act, 28 USC 2201, discloses the intent of Congress to vest District Court with jurisdiction of the case at bar, "In a case of actual controversy within its jurisdiction, except with respect to Federal Taxes, any court of the United States, upon filing of an appropriate pleading, may declare the rights and other legal relations

of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

The Declaratory Judgment Act has been used as a remedy in many cases to determine the meaning of statutes and their application. For example, in Tennessee Coal I & R Co. v. Muscoda Local No. 123, 321 U. S. 590, 88 L. Ed. 610, 64 S. Ct. 698, the remedy was used to determine a problem of what constituted work or employment in underground iron ore mines within the meaning of Fair Labor Standards Act (Jan. 25, 1938) 52 Stat. 1060, c. 676, 29 USCA Sec. 201, 9 FCA Ttitle 29, Sec. 201. The question was one of first impression, arising out of conflicting claims based upon the activities pursued and upon prior custom and contract in the iron ore mines.

Appellants contend that Meyers v. Bethlehem Shipbuilding Corp. 303 U. S. 41, 50-51, cited on page 24, Board's Brief, does not apply to sustain the contention that only Board has jurisdiction to entertain the declaratory relief here sought to determine coverage. That was a case for decision of whether a Federal District Court had equity jurisdiction to enjoin the National Labor Relations Board from holding a hearing upon a complaint filed by it against an employer alleged to be engaged in an unfair labor practice, prohibited by Labor Relations Act of July 5, 1935, Chap. 372, 49 Stat. at L. 449, 29 USCA, Sec. 151. That case can be distinguished:

1. That case involved an unfair labor practice prohibited

by the "Wagner Act," Labor Management Relations Act, 1935, and involved a matter then pending under the administrative jurisdiction of the Board; in the case at bar nothing has been filed nor is any issue before the Board, nor did either Appellants or Appellee invoke the jurisdiction of the Board, as neither party contended the existence of an unfair labor practice, or other conduct prohibited by the "Taft-Hartley Act." This matter before the District Court only involved a controversy relative to whether the industry in its negotiations for a new contract was governed by the rules of the "Taft-Hartley Act" or not, and this was based upon a disputed issue of facts of whether the industry was engaged in or affected interstate commerce.

2. Because under "Taft-Hartley Act," Sec. 10(a) has been changed to overcome the ruling in Bethlehem Steel Corp. v. N. Y. State Labor Relations Board, 330 U. S. 767, 91 Led. 1234, 67 S. Ct. 1026.

3. The above case was a case asking only for equity relief, and the absence of other adequate remedies before an injunction can be issued is required. The case at bar involves only an action for declaratory relief. It is true that an injunction was asked for, but only as an ancillary remedy and for no other purpose.

At first reading Macauley v. Waterman Steamship Corp. 327 U. S. 540, cited in Board's Brief, does sustain Board's contention (page 24, Brief) that general exhaustion of administrative procedure is required before threatened injury can be enjoined. But the case has no application here where the main issue is: Is the District Court empowered

to entertain a complaint for declaratory relief in proper controversy? That case can be distinguished on all the grounds suggested relative to the Myers case, and

2. Further the Waterman case decided only the question of Court's powers to issue injunctions prior to exhaustion of administrative procedures. The nature of that case determined the litigation when it was found the Court was not authorized to issue an injunction, for nothing else was sought by the complaint. Under this appeal, should this Court find the District Court was without jurisdiction to issue an injunction as an ancillary remedy to Appellants, for any reason, still it would not preclude the District Court from affording the declaratory relief sought by Association.

3. The Waterman case was limited to a consideration of the Myers case under the "Wagner Labor Act" and did not consider the amendments accomplished by the "Taft-Hartley Act."

4. In principle we feel this argument has been fully answered by the late United States Supreme Court's decision in Algoma P. & V. Co. v. Wisconsin Emp. Rel. Bd., ... U. S. ....., 93 L. Ed. 549. There is and can be no conflict in this case between the Board's jurisdiction under Sec. 10(a) of "Taft-Hartley Act" and the Federal Declaratory Judgment Act, because this Court could find that declaratory relief is proper in this case, and still find that the District Court was without jurisdiction to issue an injunction. If Appellants' complaint states a controversy appropriate for declaratory relief and should not have power to issue in-

junction, the complaint should still stand as far as the cause of action for declaratory relief is concerned.

This was essentially what has been decided in the case of Maryland Casualty Company v. Pacific Coal & Oil Co., 312 U. S. 270, 85 L. Ed. 826. The District Court had sustained a demurrer to a complaint for a declaratory judgment by an insurer against insured and others to establish nonliability of insurer and a temporary injunction restraining the proceedings in State Court pending final declaratory judgment.

The Supreme Court of the United States held that there was a good complaint for declaratory relief alleging a proper actual "controversy." However, the Court held that the District Court did not have power to issue the injunction and remanded the case for further proceedings in conformity with the opinion.

Assuming for argument only that the Board's position be correct in this case and that the District Court had no jurisdiction to issue a temporary injunction to restrain or prevent what the Appellees contend to be unfair labor practices—Appellants contend this is not fatal to our right and the Court's power to entertain a complaint for declaratory relief in a proper case.

The case of Aircraft & Diesel Equipment Corp. v. Hirsch, 331 U. S. 752, can be distinguished. The case was placed on the holding of the Myers and Waterman cases, holding in effect that the equity jurisdiction of the Federal District Court could not be invoked without first exhausting the administrative remedies—but since the injunction was the

only remedy sought in the action the denial of the Court's power to issue the injunction ended the litigation. It will be noted in that case the Court pointed out, at page 772, (This case did not involve the Labor Management Acts).

> "Where the intent of Congress is clear to require administrative determination, either to the exclusion of judicial action or in advance of it, a strong showing is required, both of inadequacy of the prescribed procedure and of impending harm, to permit short-circuiting the administrative process. Congress's commands for judicial restrain in this respect are not lightly to be disregarded."

At page 91, L. Ed. 1805, 331 U. S. 765, the Court found,

> ". . . the Internal Revenue Code in redetermining a deficiency in taxes. Moreover, Sec. 403(e)(1) commands: "The filing of a petition under this sub-section shall not operate to stay the execution of the order of the Board under sub-section (c)(2)."
>
> "In the Waterman Case, taking account of these provisions, we said: "The legislative history of the Renegotiation Act, moreover, shows that Congress intended the Tax Court to have exclusive jurisdiction to decide questions of fact and law, which latter include the issue raised here of whether the contracts in question are subject to the Act . . ."

It is therefore clear that as an abstract proposition of law, the Waterman and Aircraft cases did not decide the point in the Board's Brief that only Board could determine coverage in spite of Federal Declaratory Judgment Act. Those cases merely held that in the acts under consideration it was the clear intent of Congress to make the administrative procedure exclusive. Nowhere in the Labor Management Relations Act of 1947, or the Declaratory Judgment Act,

is the Appellee able to so point out specifically where Congress so intended. The Algoma P. & V. Co. v. Wisconsin Emp. Rel. Bd., ... U. S. ....., 93 L. Ed. Adv. 10 541, held that Congress did not so intend at least in respect to unfair labor practices, which might be in addition to those set forth in Sec. 8 of the Taft-Hartley Act, in respect to the States to prevent other unfair labor practices.

The annotation in 173 A. L. R. 1427, relative to changes made in "Taft-Hartley Act" from "Wagner Act," points out:

> "Sec. 35. JURISDICTION OF THE NATIONAL LABOR RELATIONS BOARD:
>
> "Under the Wagner Act the power of the Board to prevent unfair labor practices was exclusive. This is now changed. The Board's power in this respect is not "to be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise." As well be hereinafter pointed out, the Act provides remedies in certain cases before the courts at the instance of the parties. This section of the Act makes it clear that when two remedies exist, one before the Board and one before the courts, the remedy before the Board shall be in addition to, and not in lieu of, other remedies."

It is true that remedies to prevent unfair labor practices were concerned; and references made to the rights conferred by "Taft-Hartley Act" on persons to appeal in certain instances to the Courts, still nowhere in the Appellees' Brief do they point out where Congress has expressly limited the powers of District Courts under the Declaratory Judgment Act.

The arguments of the Board in its Brief under points I,

II and III, assume that the National Labor Relations Act, 1947, and Sec. 10 thereof—gives the Board exclusive jurisdiction to determine coverage when that matter is the subject of a proper controversy under the Declaratory Judgment Act, simply because this is a subsidiary matter to be determined when complaints are made to the Board under Sec. 8. This further assumes the presence in Section 10 of the provision, "and no Federal District Court under the Declaratory Judgment Act, shall ever exercise its power or give declaratory relief, when such application of the Act is the subject of a controversy, upon which the parties may have reached opposite views." This is, of course, not true.

For the reasons stated above it follows that if this Court holds with the Appellants on Points I and II of the Board's Brief, then its argument under Point III must fail, because it assumes exclusive jurisdiction of the Board. It is to be remembered that no unfair labor practice is present in the complaint because, by stipulation, the parts of the complaint were withdrawn by stipulation.

It is believed that we have sufficiently answered the entire Brief of the Unions in our answer to the Board's Brief, above. One point, however, made in the Unions' Brief to the effect that the matter it moot, requires an answer. (Unions' Brief, pages 31 to end). This contention is based on the following contention in Unions' Brief, page 32, "The record shows that the complaint on file in this action prays for an advisory opinion only and for legal advice on a contract that not only expired by its own terms but has also terminated by the acts of the parties." This entire argu-

ment will not bear exploration, because a careful reading of the complaint disclosed that the old contract being about to expire gave rise to the negotiations for a new contract and that the controversy sought to be determined is whether the National Labor Relations Act of 1947, is applicable to the industry so that it would govern any new contract entered into between Association and Unions. This action did not seek to determine any rights or liabilities under the old contract which did expire before the Court rendered declaratory relief or ruled on the motions interposed by Appellees. The justiciable controversy before the court did not involve the old contracts, it involved whether or not under the facts alleged in the complaint in reference to the activities of the Association and Union in the industry came within the commerce provisions of the National Labor Relations Act of 1947. This impasse was entered into and opposite views taken by the parties, in respect to the new contracts under negotiation. For that reason the entire argument in respect to the question being moot is now well founded.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court below should be reversed and the case remanded for further proceeding, to-wit to determine after issue joined, the question of whether or not the Association and Unions and industries are governed by the National Labor Relations Act of 1947.

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